SUPREME COURT, U.S.

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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

J. FRANK HANCOCK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

No. 1887

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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J. FRANK HANCOCK,
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v. No.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on April 28, 1971.

CITATIONS TO OPINIONS BELOW

Opinions below have not yet been officially reported but are appended.

JURISDICTION

The judgment of the United States Court of Appeals, printed in Appendix A hereto, was entered on April 28, 1971. The petition for rehearing was denied on May 27, 1971. The Court of Appeals on June 11, 1971, stayed its mandate to June 26, 1971.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) and Rule 19 of United States Supreme Court. 28 U.S.C. § 2403 may be applicable.

THE QUESTIONS PRESENTED

1. Could the United States Court of Appeals lawfully utilize the definition of "small business investment company" set forth in 15 U.S.C. § 662 to provide the definition for "small business investment company" in 18 U.S.C. § 657, in spite of the fact that the definition appearing in 15 U.S.C. § 662 is specifically limited to that segment of the Code?

2. Does it violate basic concepts of due process to permit the federal government full use of process for deposing witnesses (before the Grand Jury) while denying the defendant-petitioner any use of process for the deposing of witnesses in preparation of the defense?

3. Could the court of appeals lawfully affirm a denial of a motion for witness list where, at trial, the government produced a witness, not shown to be known to the defendant, who testified orally as to rules and regulations and the violations thereof by defendant, without producing the rules and regulations and without predicating their use by showing their publication in the Federal Register as required by Title 44 § 1505?

4. Does the totality of the trial circumstances violate constitutional guarantee of due process wherein: (a) an opinion statement by prosecuting attorney characterizes the judge as having told the jury what the accused had done; (b) testimony, over objection, that the government rules prohibited loaning of federal money to a close relative of the loan company, that such rules had the force of law, and a subsequent instruction from the court that to apply funds contrary to law would be a criminal misapplication of the funds; (c) an instruction from the court that the defendant intended the natural results of his act, which thereby caused the jury to find that the defendant, at the time of making loans, intended that such loans should not be repaid, unless the jury should

find that the failure to repay was an unnatural result; (d) the judge instructed the jury that if there were two (2) equally reasonable theories, one of which supported innocence and one of which supported guilt, the jury must find innocence, because then the government would not have proved its case beyond a reasonable doubt?

5. Was the accused reasonably alerted by 18 U.S.C. § 657 that it was a criminal offense, i.e. a misapplication of funds, to, as an officer of a small business investment company financed by the Small Business Administration, make loans secured by proper note, given by a financially responsible debtor, where such funds will subsequently be used by such debtor for the payment of debts owed by the debtor to the defendant personally?

6. Did the failure of the court to caution the jury that they should scrutinize very carefully evidence from an accomplice cause such fundamental error as to merit reversal where such error was not presented to the trial court nor to the circuit court of appeals?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are the due process clause of the Fifth Amendment to the United States Constitution and the right to confront witnesses guaranteed by the Sixth Amendment to the United States Constitution. The statute under which petitioner was prosecuted was 18 U.S.C. § 657. The court of appeals clarified such statute by using the definition of "small business investment company" set forth in 15 U.S.C. § 662. Petitioner further relies upon the provisions of 44 U.S.C. § 1505.

The above constitutional provisions and statutes are as follows:

CONSTITUTION OF THE UNITED STATES

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

18 USC § 657 Ch. 31 Lending, credit and insurance institutions

Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, Home Owners' Loan Corporation, Farm Credit Administration, Federal Housing Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under

the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, or any small business investment company, and whoever, being a receiver of any such institution, or agent or employee of the receiver, embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount or value embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both. June 25, 1948, c. 645, 62 Stat. 729; May 24, 1949, c. 139, § 11, 63 Stat. 90; July 28, 1956, c. 773 § 1, 70 Stat. 714; Aug. 21, 1958, Pub.L.85-699, Title VII, § 703, 72 Stat. 698; Oct. 4, 1961, Pub.L.87-353, § 3(q), 75 Stat. 774.

Title 15 § 662. Ch. 14B Definitions

As used in this chapter–

(1) the term "Administration" means the Small Business Administration;

(2) the term "Administrator" means the Administrator of the Small Business Administration;

(3) the terms "small business investment company", "company", and "licensee" mean a company approved by the Administration to operate under the provisions of this chapter and issued a license as provided in section 681(c) of this title;

(4) the term "State" includes the several States, the Territories and possessions of the United States, the Commonwealth of Puerto Rico, and the District of Columbia;

(5) the term "small-business concern" shall have the same meaning as in the Small Business Act;

(6) the term "development companies" means enterprises

incorporated under State law with the authority to promote and assist the growth and development of small-business concerns in the areas covered by their operations; and

(7) the term "license" means a license issued by the Administration as provided in section 681(c) of this title.

Title 44 § 1505. Documents to be published in Federal Register

(a) Proclamations and Executive Orders; documents having general applicability and legal effect; documents required to be published by Congress. There shall be published in the Federal Register—

(1) Presidential proclamations and Executive orders, except those not having general applicability and legal effect or effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof;

(2) documents or classes of documents that the President may determine from time to time have general applicability and legal effect; and

(3) documents or classes of documents that may be required so to be published by Act of Congress.

For the purposes of this chapter every document or order which prescribes a penalty has general applicability and legal effect.

(b) Documents authorized to be published by regulations; comments and news items excluded. In addition to the foregoing there shall also be published in the Federal Register other documents or classes of documents authorized to be published by regulations prescribed under this chapter with the approval of the President, but comments or news items of any character may not be published in the Federal Register.

STATEMENT OF THE CASE

The petitioner, defendant below, was charged on a nine count indictment with violation of Title 18 § 657, United

States Code Annotated. The record shows that petitioner made a series of loans, as President of Clearwater Capital Corporation, a small business investment company licensed by the Small Business Administration. None of the companies or individuals were shown to be financially irresponsible or otherwise unqualified to receive a loan from a small business investment company.

The loan described in Count One of the indictment was repaid to Clearwater Capital Corporation. The loan described in Count Two of the indictment at the time of the trial had been paid down from $50,000 to $25,000 and was at that time current. The loan described in Count Three of the indictment was subsequently repaid to Clearwater Capital Corporation. The loan described in Count Four of the indictment is not shown in the record as not repaid. The loan described in Count Five of the indictment is not shown in the record as not unpaid. The loan described in Count Six of the indictment is not shown in the record as not unpaid. The loan described in Count Seven of the indictment was shown in the record as unpaid. The loan described in Count Eight of the indictment was described as "cancelled," which term is as consistent with repayment as with nonpayment. The loan described in Count Nine of the indictment was not shown in the record as not being paid.

Monies of the debtors who received the loans from Clearwater Capital Corporation were used in each case to the advantage of petitioner, either by the debtor paying off debts he owed to petitioner personally, or as loans to petitioner.

Anthony DiMuzio, an employee of the Small Business Administration, was permitted to testify that it was a violation of S.B.A. regulations to make loans to people who had an interest in the small business investment company, or their relatives, and to make loans for less than five (5) years. He further testified there had been no requests for exemptions from this regulation made on behalf of Clearwater Capital Corporation.

Jack A. Smith, President of Jack A. Smith Properties, Inc., shown by the record to have received a loan, testified that he was petitioner's brother-in-law.

No written regulations were ever proffered or entered in evidence.

The court instructed the jury that the case was brought under Section 657 of Title 18, United States Code, and then instructed the jury that the phrase "small business investment company" means a company approved and licensed by the Small Business Administration.

The jury returned a verdict of guilty on all nine (9) counts of the indictment and after denying a motion for new trial, the court imposed a sentence of five (5) years, counts two (2) through nine (9), running concurrently with count one (1). Petitioner filed his notice of appeal to the United States Court of Appeals, Fifth Circuit, on the sixth day of June, 1969, and there specifically raised, inter alia, the denial of his motion for a list of witnesses and the vagueness of the act under which he was charged.

The court of appeals affirmed the conviction and held that petitioner was not prejudiced by denial of his motion for a list of witnesses because he knew all of the major witnesses and further that Section 657, Title 18, was not fatally defective for vagueness for its failure to specify that the term "small business investment company" included only those licensed under the Small Business Administration.

A petition for rehearing was denied on May 27, 1971, but a motion to stay the mandate was granted until June 26, 1971.

Petitioner now seeks a Writ of Certiorari by this petition.

BASIS FOR FEDERAL JURISDICTION

Petitioner was charged with a felony under Title 18 § 657 for alleged offenses against the United States in his capacity as an officer of a small business investment company.

ANALYSIS OF WHY CERTIORARI SHOULD BE GRANTED

1. The first reason why review should be granted is that the statute under which the defendant was prosecuted, 18 U.S.C. § 657, is too ambigous to support the charge. The reasons as to the defendant are threefold. First, the statute fails to give the definition of the term "small business investment company" so as to restrict the definition to the federally licensed companies. Without such restriction the statute would be a nullity as being clearly outside the federal congressional legislative authority. The court of appeals recognized the urgent need for such a definition and reached back three (3) titles in the Code and many volumes of the Code Annotated to produce the desired definition from 15 U.S.C. § 662. However, that definition specifically provides that it is limited to chapter 14 of Title 15 of U.S.C. The circuit court's attempt to use the statute before codified, when the definition and offense were more closely tied, should be summarily rejected in a criminal case. The basic concepts of notice as to criminal sanctions contemplate the accused being able to rely on the statutory codification where, as here, the material law has been codified.

The second ambiguity is that the statute by use of the terms "embezzle," "abstract," and "wilfully misapply" fails to notify defendant that he is in violation if he makes a bona fide company loan (note and security) to a financially responsible applicant if the money is to then be lent by the applicant to the officer. The court provided this knowledge by its instruction to the jury, but unfortunately the accused did not have the benefit of court instruction prior to engaging in the transactions.

Third, the statute failed to state that if a loan was made in violation of a regulation of the Small Business Administration, it would constitute a criminal offense. As stated, the court clarified this fact by permitting, over objection, testimony that a regulation prohibited loans to relatives of the board, that such regulation had the force of law, and that such loans were made by the defendant, and then instructing the jury that a

person who does an act (makes a loan) which the law forbids so as to wilfully disregard the law may be found to act with specific intent (criminal). See Court of Appeals Record, page 466 and 468.

This Court should also consider that 18 U.S.C. § 657 appears to apply only to companies insured by small business investment companies. Note that Pub. L. 85–699, Title VII, § 703, states that 18 U.S.C. § 657 is amended by adding "or any small investment company" to "the Federal Savings & Loan Insurance Corporation." Overlooked was that this later term was modified by the provision "insured by" and that such modification would apply to the term "small business investment company."

This Court held in *Watkins v. U.S.*, 347 U.S. 612, 1 L.Ed. 2d 1243, that a criminal statute must give warning of what is prohibited. 18 U.S.C. § 657 gives no warning that bona fide loans become criminal when the borrowers permit the officer of the lending company to use the proceeds. The statute on its face would permit a direct loan to the officer by the company if, as here, proper notes were signed. The statute by the use of the terms "embezzlement" and "misapplication" gives adequate notice that where an officer, as in the case of *Hargreaves v. U.S.* 75 F.2d 68, knowingly lends corporate funds to a financially irresponsible creditor with the intent that such officer utilize the funds to his personal benefit, criminal sanctions are imposed. However, where, as here, the corporation receives a quid pro quo, to-wit a bona fide debt and interest obligation in return for the corporate loan, the statute in no way notifies the defendant that criminal sanctions should be expected.

The defendant asked for court process in the taking of depositions prior to trial and a list of government witnesses. The court of appeals sustained the trial court's denial of such request, noting the statutory exception for capital cases and the fact that discovery in criminal cases was more restricted than in civil cases. Admittedly, present law supports the

appellate court holding. Thus, as to the right to counsel the courts were years in recognizing the absurdity of limiting such right to capital cases. This Court should now end such unreasonable distinction as to discovery in capital and felony cases. The prosecution is given full access to the court's process in the guise of presenting testimony to the Grand Jury. The prosecution thus prepares itself through the use of court process. The defense is given no opportunity to prepare by the use of court process. The court of appeals excused this factor by stating that the witnesses were friends of the defendant. What was ignored was the fact that these friends were shown to have been intimately involved in the questioned transactions and were, therefore, anxious to have favor with the prosecution. They were, therefore, not readily available to the defense except through that judicial process which was used by the prosecution.

Prohibiting use of court process to question witnesses prior to trial is not violative of due process. However, to give such process to one side and deny it to the opposing party is an abuse of the inherent concepts within the due process clause of the Fifth Amendment to the United States Constitution. There is no constitutional provision that the Grand Jury procedure is to be handled by the prosecution. The government's access to Grand Jury testimony has been artificially imposed, as has the defendant's exclusion. The defendant is entitled to be protected from the "artificially created" inequity of permitting the government to prepare by use of the court's process while denying to the defense court process to prepare. This inequitable imbalance can be removed simply by affording the defense, not access to the Grand Jury, but access to that judicial subpoena power utilized by the prosecution.

The court failed to give the cautionary instruction as to testimony of an accomplice. Inasmuch as the witnesses knowingly aided the defendant (see *Mulloney v. U.S.*, 79 F.2d 566) in the carrying out of the criticized transaction, such instruction should have been given. The witnesses had great reason

to be fearful of the prosecution, and the jury should have been alerted that their testimony should be viewed with caution. Failure to do so was fundamental error, regardless of the fact that it was not raised in the trial or appellate court. See *Williamson v. U.S.*, 332 F.2d 123; *McMillen v. U.S.*, 386 F.2d 29.

The Court should also consider the prejudicial effect of the trial court's instruction that a person intends the natural results of his acts (R 467). This had the effect of stating that if the loans made by the defendant were not repaid, he intended that they not be repaid unless default was unnatural. Clearly, the instruction should have been limited to where only one natural result was reasonably possible.

Respectfully submitted,

JACK F. WHITE, JR.
322 South Osceola Avenue
Clearwater, Florida

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were furnished to Hugh N. Smith, Esquire, United States Attorney, United States Post Office Building, Tampa, Florida, and to Honorable Erwin N. Griswold, Solicitor General, United States Department of Justice, Washington, D.C. 20530, by mail, this ..... day of June, 1971.

JACK F. WHITE, JR.
322 South Osceola Avenue
Clearwater, Florida

Counsel for Petitioner

APPENDED OPINION

THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 28067

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

J. FRANK HANCOCK,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

(April 28, 1971)

Before BROWN, Chief Judge, WISDOM and MORGAN, Circuit Judges

BROWN, Chief Judge: J. Frank Hancock, former president and principal organizer of the Clearwater Capital Corporation, was charged in a nine count indictment with embezzling, abstracting, and willfully misapplying small business investment company funds in violation of 18 U.S.C.A. § 657. Following a jury trial he was convicted and sentenced to concurrent five-year terms on all counts. We affirm.

Initially Hancock alleges error of constitutional dimensions by asserting that the Trial Court's denial of his motions for a list of government witnesses and a discovery order for the purpose of taking their depositions violated his rights under the Fifth and Sixth Amendments. We reject this contention. Apart from the Congressionally created exception in capital cases,[1] the granting of a defense request for a list of adverse witnesses is a matter of judicial discretion, and a denial can be challenged only for abuse. *O'Neal v. United States*, 5 Cir., 1969, 411 F.2d 131, 138, *cert. denied*, 396 U.S. 827, 90 S.Ct. 72, 24 L.Ed.2d 77; *Downing v. United States*, 5 Cir., 1965, 348 F.2d 594, 599, *cert. denied*, 382 U.S. 901, 86 S.Ct. 235, 15 L.Ed.2d 155. All of the major witnesses were individuals with whom the defendant had had significant personal or financial relations, and it does not appear that the list would have materially aided him in the preparation of his defense.

Likewise, with the scope of discovery in criminal prosecutions narrower than it is in civil cases, *Campbell v. Eastland*, 5 Cir., 1962, 307 F.2d 478, 487, *cert. denied*, 371 U.S. 955, 83 S.Ct. 502, 9 L.Ed.2d 502, and in the absence of a rule which permits the taking of depositions of witnesses who will appear at the trial of a criminal case, we cannot say at this juncture that such a procedure has yet been elevated to a constitutional plane even though some states have seen fit to adopt it.[2] In any event the defendant's relationship with the prospective witnesses precludes a finding that he was prejudiced by the denial of his motion for discovery.

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[1] 18 U.S.C.A. § 3432.

[2] Fla.R.Crim.P. 1.220.

Appellant also asserts that § 657 is fatally defective—presumably on grounds of vagueness—because it does not explicitly define the phrase "small business investment company," and that this omission can be cured only by the indictment's unwarranted addition of the words "licensed under the Small Business Investment Act." Since Title VII of the Small Business Investment Act of 1958[3] amended the related criminal provision, we think it clear that the reference in § 657 is only to those businesses licensed under the Act, rather than to all small businesses generally. Clearwater Capital Corporation is thus a "small business investment company" designated by § 657.

As for Appellant's argument that he could more appropriately have been charged under 18 U.S.C.A. § 1006,[4] the obvious answer is that a criminal defendant has no choice in the matter. Prosecutorial decisions of this nature are wholly matters of Executive discretion. *United States v. Cox*, 5 Cir., 1965, 342 F.2d (en banc), *cert. denied sub nom. Hauberg v. Cox*, 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700.

Finally Appellant mounts a frontal assault on the sufficiency of the evidence, contending that the funds were not the property of the corporation at the time he acquired them. We think it clear from a careful reading of the record that there

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[3] "Section 657 of title 18, United States Code, is amended by inserting after 'Federal Savings and Loan Insurance Corporation,' the following: 'or any small business investment company.'" 72 Stat. 689, 698 (1958).

[4] Fraudulent misapplication of funds is the essence of § 657, while § 1006 proscribes fraudulent receipt. United States v. Weaver, 7 Cir., 1966, 360 F.2d 903, 904.

was ample evidence from which the jury could have concluded that the defendant had engineered a series of corporate loans entailing direct or circuitous repayments to himself, in which the borrowers—all personal or business acquaintances—were mere conduits through which the funds were ultimately rechanneled for his use or benefit, not the least of the benefits being that the equity capital required by the organizers of a small business investment company came from loans made by the company after it was set up. The predictable result of these transactions was that Hancock benefited and Clearwater Capital Corporation went into receivership. The evidence amply supports a finding of misapplication of corporate funds with criminal implications.[5]

AFFIRMED.

[5] We need not here belabor the technical and perhaps somewhat illusory distinctions between the terms "embezzle," "abstract," "purloin," and "willfully misapply," a problem we considered under the identical provisions of § 656 in *Williamson v. United States*, 5 Cir., 1964, 332 F.2d 123, 133. The Trial Court's instructions incorporated adequate definitions, and we think the jury might properly have concluded that the acts charged fell within any or all of these prohibitions.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-340

J. FRANK HANCOCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 14–15) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1971. A petition for rehearing was denied on May 27, 1971. On June 25, 1971, the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. Whether in a prosecution for misapplication of the funds of a small business investment company,

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the underlying statute, 18 U.S.C. 657, is void because of vagueness.

2. Whether petitioner's pretrial requests for a list of government witnesses and a discovery order were properly denied.

3. Whether, in the circumstances of the present case, the court, in the absence of a defense request, was required to instruct as to accomplice testimony.

4. Whether the prosecutor's opening statement and certain instructions of the court were improper.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on all nine counts of an indictment which charged the willful misapplication of the funds of a small business investment company (18 U.S.C. 657). He was sentenced to concurrent prison terms of five years. The court of appeals affirmed (Pet. 14–17).

The evidence showed that in November 1963, at Clearwater, Florida, petitioner formed and thereafter was the principal stockholder and chief executive of the Clearwater Capital Corporation (Clearwater), a Small Business Investment Company (SBIC) approved and licensed by the Small Business Administration (App. 99, 119, 196).[1] Clearwater had an initial capital of $300,000, much of it borrowed (App. 75–77, 129, 147, 159, 169).

[1] "App." refers to the court of appeals' appendix of the trial transcript and allied papers which is presently on file with the Clerk of this Court.

An SBIC is a company established to borrow funds from the Small Business Administration and lend money to small businesses that may have difficulty in securing loans from banks or other conventional commercial lending institutions (App. 99, 102, 119, 194, 195, 197). Self-dealing transactions, including personal loans to officers, directors, principal stockholders or their relatives, without the advance approval of the Small Business Administration, are prohibited by Small Business Administration regulations (App. 197).

In January 1964, the government loaned Clearwater $300,000, and in May 1964 an additional $300,000 (App. 103–104, 196). In February 1964, $220,000 of the first government loan was used by petitioner to make loans to businessmen, including his brother-in-law (Counts 1–6). After receipt of the second government loan, petitioner made loans of approximately $116,000 to business acquaintances (Counts 7–9). In some instances, the borrowers had no business need for the loans and the loans were made at petitioner's instigation (App. 262, 290–291). In all instances shown in the indictment, the ostensible borrowers from Clearwater used the money received to retire debts owed by or to petitioner or to make loans to petitioner (App. 189–192, 203–206, 218, 234, 249–250, 260–261, 270, 273, 287, 296, 304; Pet. 7). Clearwater had not requested any exemptions from the loan restrictions imposed by the Small Business Administration regulations (App. 201).

In July 1964, Clearwater made its first interest payment on the first government loan but subsequently was unable to make any other interest payments when due. The government finally had it placed in receivership (App. 128, 282).

ARGUMENT

1. Petitioner asserts that the statute (18 U.S.C. 657) under which prosecution was brought is ambiguous because it fails to define a small business investment company, fails to specify what constitutes the willful misapplication of funds, and fails to warn of the possible existence of an implementing regulation which prohibits self-dealing transactions by an officer of an SBIC (Pet. 9–10). The statute, however, gives adequate notice of what it prohibits. See *United States* v. *Harris*, 347 U.S. 612, 617–620; *Ginsberg* v. *New York*, 390 U.S. 629, 643. The term "small business investment company" is defined in 15 U.S.C. 662 and petitioner, whose company received loans from the Small Business Administration, must have known of Clearwater's status as an SBIC. The term "willfully misapplies" is not vague. Moreover the requirement that an act be willful relieves a statute of an objection that it punishes an offense of which the accused was unaware.

Here the gravamen of the crime is the fraudulent conduct of an officer in misapplying the funds of his institution.[2] The jury properly found that petitioner

[2] See *United States* v. *Weaver*, 360 F. 2d 903, 905 (C.A. 7), certiorari denied, 385 U.S. 825.

had acted fraudulently in misapplying Clearwater's funds. If petitioner lacked knowledge concerning the specific statutory section involved, or the existence of an implementing regulation,[3] it is no defense. *United States* v. *Dardi*, 330 F. 2d 316, 330–331 (C.A. 2), certiorari denied, 379 U.S. 845.

The court carefully instructed the jury that a criminal misapplication of funds required a knowing and willful act with intent to defraud (App. 331–332).

2. Petitioner, while admitting that the law is to the contrary, contends that the trial court erred in denying him a list of government witnesses and a discovery order permitting him to take their depositions (Pet. 10–11). The court of appeals correctly observed in its opinion, upon which we rely, that petitioner had no right to such discovery, nor, even assuming such a right, could its denial in the present case have resulted in any prejudice. Each count of the indictment contained detailed averments which disclosed the names of each ostensible borrower or other person who served as a conduit for the misuse of the funds.

3. Petitioner contends that the court, *sua sponte*, should have instructed as to the need to receive accomplice testimony with care (Pet. 8, 11, 12). In the absence of a proper request, the giving of such an instruction is not required. *Caminetti* v. *United States*, 242 U.S. 470, 495; *Holmgren* v. *United States*, 217 U.S. 509, 524. In the present case the defense did not request such an instruction, presumably because gov-

[3] 13 CFR 107.1004.

ernment witnesses who were accomplices (see *United States* v. *Nolte*, 440 F. 2d 1124, 1126 (C.A. 5)), were friendly to petitioner and laudatory of his efforts in the Clearwater enterprise (*e.g.*, App. 135, 139, 140). In such circumstances, failure to give the instruction could not have resulted in prejudice to petitioner.

4. Petitioner raises but does not argue a miscellany of other points which are based on misreadings of the record. Petitioner states that the prosecutor in his opening statement indicated that the trial judge had already told the jury "what the accused had done" (Pet. 2). When read in context, it is clear that all the prosecutor said was that the court had previously "outlined" the indictment to the jury and that the government hoped to prove that the defendant's acts fit the conduct outlined in the indictment (App. 41–44).

Petitioner also mistakenly asserts that the rules and regulations of the Small Business Administration concerning self-dealing transactions were not produced in court and may not have been published in the Federal Register (Pet. 2, 8). The record shows that they were so published and that a copy was properly accepted by the court as the law applicable to the present case (App. 305–306). See 15 U.S.C. 687d; *Lichter* v. *United States*, 334 U.S. 742, 785; *Paul* v. *United States*, 371 U.S. 245.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1971.

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No. 70-340

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

J. FRANK HANCOCK, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

JACK F. WHITE, JR.
322 South Osceola Avenue
Clearwater, Florida

Attorney for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES

No. 70-340

J. FRANK HANCOCK, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR REHEARING

Petitioner, J. Frank Hancock brings this Petition for Rehearing from the order dated October 12, 1971, denying his Petition for Certiorari and for grounds alleges:

The jury may well have convicted this Petitioner of violating the rules and regulations of the Small Business Administration, which do not carry criminal penalties, rather than of violating the act under which he was charged.

Regrettably this point was not clearly presented to Trial Court nor to the United States Court of Appeals.

That there is error is irrefutable, although it was not readily ascertainable because of the intricacies of the case.

The point initially came to light in the Solicitor General's brief (p. 4-5) and a reply brief was at the printers when word was received that the Petition for Certiorari was denied.

Anthony DiMuzio, an unheralded witness for the government, took the stand and revealed that he was a financial

analyst for the Small Business Administration, (App. 193) and familiar with the rules and regulations of the Small Business Administration (App. 196, 197). Over objection he was permitted to state that the rules and regulations provided, inter alia, that small business investment companies could not make loans to relatives, or loans to individuals if it was not for the purpose of a small business (App. 197, 201).

The Defendant's brother was called as a government witness to testify that he had an interest in a corporation that had received a $7,500.00 loan from a corporation that had obtained a loan from Clearwater Capital Corporation (App. 268-271).

Gilbert Gerard, a witness for the government, testified that he received a loan from Clearwater Capital Corporation but that he did not need the money for the business at that time (App. 261, 262).

Thereafter the trial Judge instructed the jury that in each count a necessary element of the offense was "specific intent" to do wrong (App. 331) and that

> "A person, who knowingly does an act which the law forbids, intending with evil (466) motive or bad purpose either to wilfully disobey or disregard the law, may be found to act with specific intent."

The jury was further instructed that:

> "An act is done wilfully if done voluntarily and intentionally, and with specific intent to do something the law forbids, that is to say, with bad purpose either to disobey or to disregard the law." (App 333).

No instruction was ever given defining what constituted the "law" or distinguishing the rules and regulations of the Small Business Administration from Section 657, Title 18 United States Code, or that violations of the rules and regulations themselves carried no criminal penalties and did not have the force of law in the case at trial (App. 323-337).

The rules and regulations of the Small Business Administration presented to the jury through the testimony of Anthony DiMuzio, were not properly before the jury and had no place under the circumstances of the trial of the case. This principle of law is clearly set forth in the Court's holding in the case of *United States v. Eaton,* 36 L. Ed. 591; 12 S. Ct. 764; 144 U. S. 677.

In that case the Court said:

> "Regulations prescribed by the president and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

The principle of law clearly demonstrates the error in permitting testimony concerning violations of rules and regulations of the Small Business Administration. Where error is shown but not clearly demonstrated to be harmless by the facts themselves, prejudice is presumed. *Pettina v. New Mexico,* 119 CCA 581, 201 Fed. 492; *Deery v. Cray,* 5 Wall. 795, 18 L. Ed. 653; *Peck v. Heuvich,* 167 U. S. 624, 42 L. Ed. 302, 17 Sup. Ct. Rep. 927.

The point is that the regulations had been given no criminal sanction and yet were used in a criminal case to obtain a conviction.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this Petition for Rehearing be granted, and that, upon further consideration, a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

JACK F. WHITE, JR.
Counsel for Petitioner

CERTIFICATE OF COUNSEL

I, Jack F. White, Jr., counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

_____

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Petition for Rehearing were furnished to Hugh N. Smith, Esquire, United States Attorney, United States Post Office Building, Tampa, Florida, and to Honorable Erwin N. Griswold, Solicitor General, United States Department of Justice, Washington, D.C. 20530, by mail, this_____ day of October, 1971.

_____

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